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No. 88-1618

In The

Supreme Court of the United States

October Term, 1988

Earnest V. PARISIEN,
D/B/A PARISIEN EXCAVATION,

Petitioner,

v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a tribal court have civil jurisdiction over a non-Indian defendant when the non-Indian defendant is not present on the reservation and when the civil contract dispute has no direct effect on the tribe as a whole?

2. Does a federal district court have the authority to determine that a tribal court has improperly asserted jurisdiction over a non-Indian defendant?

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STATEMENT OF THE CASE

Respondent Twin City Construction Co. of Fargo, N.D. (Twin City)* contracted with the Department of the Interior and the Bureau of Indian Affairs in New Mexico to construct a school on the Turtle Mountain Reservation

* Twin City has no parent companies, subsidiaries, nor affiliates.

in North Dakota. Petitioner Ernest V. Parisien (Parisien) was a tribal member who performed work for Twin City by a subcontract dated October 7, 1981. In December 1982, Twin City took over work on the subcontract because Parisien refused to complete his work in a timely manner. When Twin City took over work on the subcontract, Parisien had already been paid at least 75% of the subcontract price.

In 1984, Parisien filed suit against Twin City in tribal court for the full amount of the subcontract, and for consequential damages allegedly resulting from breach of the subcontract. At the time Parisien commenced suit, Twin City was not performing work on the reservation. Twin City contended that the tribal court did not have jurisdiction of the matter.

The Turtle Mountain Tribal Court ruled that it did not have jurisdiction because Twin City was not a member of the tribe and had not submitted to the court's jurisdiction. (A-49). The Turtle Mountain Court of Appeals reversed. The tribal appellate court did not rest its conclusion upon the tribe's jurisdictional statute; instead, the tribal appellate court found that the tribal court could assert jurisdiction on the basis of federal common law. (A-42).

After the tribal appellate court issued its ruling, Twin City sought declaratory and injunctive relief in the United States District Court for the District of North Dakota. On August 21, 1987, the district court issued a permanent injunction, prohibiting Parisien from proceeding further with his action in tribal court. (A-22). The

court found that Twin City had not expressly submitted to the trial court's jurisdiction, a tribal code requirement for the assertion of jurisdiction. (A-25).

Parisien appealed and a divided panel of the Eighth Circuit Court of Appeals reversed. (A-6). Twin City's request for rehearing *en banc* was granted on November 10, 1988. (A-5). An equally divided *en banc* judgment was entered on January 11, 1989. (A-1). Judges McMillian, Bowman, Wollman, Magill, and Bean voted to affirm the district court's determination that the tribal court did not have subject matter jurisdiction. Chief Judge Lay and Judges Heaney, Arnold, John R. Gibson, and Fagg voted to reverse. Thus, the equally divided court affirmed the district court's judgment. (A-3).

Parisien has now petitioned this Court to issue a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Eighth Circuit. Twin City opposes Parisien's petition on the grounds that the Eighth Circuit's affirmance of the district court's decision is in accord with established United States Supreme Court precedent, there is no conflict between the circuits, and the district court correctly determined that the tribal court did not have subject matter jurisdiction over the dispute between Parisien and Twin City.

ARGUMENT

A. THE EIGHTH CIRCUIT DECISION IS CONSISTENT WITH ESTABLISHED PRECEDENT.

1. The Decision Conforms To Prior Supreme Court Decisions.

When the district court and the Eighth Circuit Court of Appeals addressed the issue of the extent of tribal jurisdiction over non-Indian defendants, the courts had guidance from a number of previous decisions by this Court. The Indian tribes have long been recognized as having the powers of a limited sovereign. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). The tribes retain those attributes of sovereignty which permit them to regulate and control internal tribal relations. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). However, certain attributes of tribal authority have been lost. *Montana v. United States*, 450 U.S. 544, 563 (1981).

One area in which sovereignty has been diminished is in the realm of authority over non-Indians. For example, Indian tribes do not have the inherent retained jurisdiction to try and punish non-Indians criminally. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). As to criminal jurisdiction, there is neither inherent tribal sovereignty nor congressionally delegated authority over non-Indians. *Id.* at 208. Thus, an important guidepost as to the reach of tribal court jurisdiction was established in *Oliphant*.

The nature of tribal sovereignty was also discussed in *United States v. Wheeler*. In *Wheeler*, this Court noted that implicit divestiture of tribal sovereignty has occurred with respect to the relations between an Indian tribe and

non-members of the tribe. *Id.* at 326. Both *Oliphant* and *Wheeler* addressed the question of the reach of the criminal jurisdiction of a tribal court. When this Court first commented on the extent of tribal power to exercise *civil* authority over the conduct of non-Indians, both criminal cases were relied upon. *See Montana*, 450 U.S. at 563-65.

In *Montana*, the issue was whether an Indian tribe could regulate hunting and fishing by non-Indians on lands within the reservation owned in fee simple by non-Indians. *Id.* at 547. One of the claimed grounds for the exercise of such power was that the tribe had retained the power as an incident of inherent sovereignty. *Id.* at 563. In an important statement regarding tribal authority, this Court noted that "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564.

As a general rule, the reach of an Indian tribe's inherent sovereign powers does not extend to the activities of non-Indians. *Id.* at 565. However, there are limited instances in which the tribes have retained the power to exercise some form of civil jurisdiction over non-Indians. *Id.* Tribes may regulate the activities of non-members who enter consensual relations with the tribe or its members. *Id.* A tribe may also exercise civil authority if the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

An example of the tribe's authority to regulate the activities of non-Indians may be found in *Williams v. Lee*,

358 U.S. 218 (1959). In *Williams v. Lee*, this Court held that a non-Indian who operated a general store on an Indian reservation must sue an Indian defendant in tribal court to collect for goods sold to the Indian on the reservation. The non-Indian plaintiff operated his reservation store under a federally-mandated license which required that the store owner submit to regulations prescribed by the Commissioner of Indian Affairs for the protection of Indians. *Id.* at 217 n.1. The holding in *Williams v. Lee* should be limited to its facts: a non-Indian plaintiff must sue an Indian defendant in tribal court. *Williams v. Lee* offers no guidance as to whether a non-Indian defendant is subject to the jurisdiction of the tribal court after the non-Indian defendant is no longer present and doing work on the reservation.

The authority to regulate a non-Indian's conduct generally relates to taxation, licensing or other forms of regulation. *Montana*, 450 U.S. at 565. Presumably, civil jurisdiction over non-Indians would extend to enable enforcement of such regulation. However, Parisien's suit against Twin City does not contemplate any enforcement of a regulation, so *Montana* does not support the assertion of jurisdiction over the Parisien/Twin City dispute.

A tribe's sovereignty also extends to conduct which has a direct effect on the political integrity, economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 566. In *Montana*, this Court found that the non-Indian hunting and fishing did not threaten the tribe's political or economic security. *Id.* The dispute between Parisien and Twin City similarly does not threaten the tribe as a whole. The dispute is a simple contract dispute, regarding payment on a subcontract.

Magistrate Karen Klein's report and recommendation filed on June 30, 1987 in this case found that the tribe was not affected by the dispute as a tribe. (A-33). She further found that there was no threat to tribal self-government or to tribal control of internal relations. *Id.* Thus, the district court's ruling that the tribal court did not have jurisdiction over Twin City is consistent with *Montana.*

Petitioner contends that two relatively recent cases support the proposition that tribal court jurisdiction of non-Indian defendants is presumed. First, petitioner relies upon *National Farmers Union Insurance Co. v. Crow Tribe,* 471 U.S. 845 (1985). In *National Farmers Union,* a non-Indian defendant objected to the tribal court's assertion of civil jurisdiction. Petitioner contends that this Court's holding was "that tribal civil adjudicatory jurisdiction has not been generally divested or implicitly limited by federal law." Petitioner's brief at 15. A more precise statement of the holding of *National Farmers Union* is that a non-Indian defendant must first exhaust his tribal court remedies before asking a federal court to determine whether a tribal court has exceeded the limits of its jurisdiction. 471 U.S. at 857. In fact, this Court decided nothing as to the reach of a tribal court's jurisdiction, but merely ruled that a tribal court must carefully examine tribal sovereignty, the extent to which the sovereignty has been divested or diminished, and federal statutes and policies which might affect tribal jurisdiction. *Id.* at 855-56. Thus, *National Farmers Union* does not support the proposition that jurisdiction over a non-Indian defendant is presumptively in the tribal court.

The other recent case relied upon by petitioner is *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987). In

Iowa Mutual, the issue was whether the diversity statute was a congressional limitation on a tribe's jurisdiction. *Id.* at 11. In ruling that the diversity statute was not a diminishment of tribal authority, the Court held that the non-Indian defendant must first exhaust the available tribal court remedies before commencing suit in federal court. *Id.* at 19.

Petitioner relies upon language in *Iowa Mutual* which states that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. In order to determine whether petitioner's allegation that jurisdiction over the Parisien/Twin City dispute "presumptively" lies in the tribal court, it is important to analyze what the Court meant by "such activities." The phrase "such activities" refers to the comment that tribal authority over the activities of non-Indians is an important aspect of tribal sovereignty. *Id.* at 18. When making the comment, the court specifically referred to certain cases which help define those activities as to which there may be tribal jurisdiction over non-Indians.

One of the cases relied upon to describe the activities was *Montana*. *Montana* held that a tribe may *regulate* the activities of non-members who enter into consensual relations with the tribe and may exercise civil authority if there is a direct effect on the tribe as a whole. *Montana*, 450 U.S. at 565. Neither condition is present in the Parisien/Twin City dispute, so the "presumptive" jurisdiction would not lie.

In addition to *Montana*, the *Iowa Mutual* Court referred to *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). In *Washington v. Confederated Tribes*, the Court held that the state of Washington could properly tax sales to non-members of the tribe, but not sales to members. *Id.* at 159-61. Although the Court was not discussing civil jurisdiction, tribal sovereignty was found not to preclude a state's decision to impose taxes on sales both to non-Indians and to Indians resident on the reservation but not enrolled in the tribe. *Id.* Thus, this Court has recognized that a tribe is sovereign with respect to its own members, but to a lesser extent with non-Indian activities on the reservation. *Iowa Mutual* does not require a finding that a non-Indian defendant is subject to the jurisdiction of the tribal court.

The most relevant Supreme Court precedent regarding tribal court jurisdiction over non-Indian defendants is, therefore, found in *Montana*. Because this case does not involve regulation of the activities of non-Indians who come in contact with the tribe or tribal members, and because Parisien's dispute with Twin City has no direct effect on the tribe, the district court properly issued an injunction prohibiting Parisien from proceeding further with the tribal court action. The Eighth Circuit affirmance of the district court's opinion was in accordance with Supreme Court precedent.

2. No Conflict Exists Between the Circuits.

Petitioner contends that the Eighth Circuit decision conflicts with the Ninth Circuit decision in *Sanders v.*

Robinson, 864 F.2d 630 (9th Cir. 1988). Although the *Sanders* court found that the tribal court had jurisdiction over a non-Indian defendant, the *Sanders* decision is distinguishable from the present case and does not present a conflict between circuits. *Sanders* involved a divorce and custody proceeding in which the children were members of the tribe and had resided upon the reservation during the marriage. *Id.* at 632. The *Sanders* decision was consistent with *Montana;* the tribal court had jurisdiction because the welfare of the tribe as a whole was affected by the divorce because of the status of the children as tribal members. *See Mississippi Band of Choctaw Indians v. Holyfield*, 57 U.S.L.W. 4409, 4414 (U.S. April 3, 1989) (tribal court had jurisdiction over adoption of Indian children because of impact on Indian children and tribe).

Sanders is also distinguishable because the Ninth Circuit did not decide whether the tribal court jurisdiction was exclusive. 864 F.2d at 633. The *Sanders* court relied upon the tribal code which gave the Tribal Council power to regulate domestic relations of tribal members and of non-members married into the tribe. *Id.* The conclusions reached by the *Sanders* court give no indication that the Ninth Circuit would decide the Parisien/Twin City dispute any differently than the Eighth Circuit. The dispute does not involve custody matters which may have a direct effect on the tribe. Therefore, there is no conflict in the circuit courts which this Court needs to resolve.

B. THE EIGHTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT THE TRIBAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION.

1. A Federal District Court Has the Authority to Decide Whether a Tribal Court Has Asserted Jurisdiction Beyond Lawful Limits.

Petitioners contend that the district court of North Dakota was bound by the tribal appellate court's declaration that the tribal court had subject matter jurisdiction of this matter. Such a position is inconsistent with the rulings in *National Farmers Union* and *Iowa Mutual*. Both cases held that although exhaustion of tribal remedies was required, a federal court may determine whether the tribal court lacked jurisdiction. *National Farmers Union*, 471 U.S. at 845; *Iowa Mutual*, 480 U.S. at 619. The district court in this matter did what it was permitted to do; it decided that the tribal court exceeded its jurisdictional boundaries when it asserted jurisdiction over the suit between Parisien and Twin City.

The Eighth Circuit properly affirmed the district court's issuance of the injunction in this matter because the tribal court had no basis for asserting jurisdiction. In concluding that the tribal court had jurisdiction, the tribal appellate court did not analyze any specific statute, treaty, or local Turtle Mountain history. Instead, the tribal appellate court interpreted federal common law. (A-42). Because the tribal appellate court did not interpret tribal law and instead merely interpreted federal common law, the tribal appellate court's decision was not entitled to any special deference.

Petitioner suggests that the tribal appellate court decision is as binding as the highest state court's interpretation of state law. However, in this case the tribal court interpreted federal, rather than tribal, law. In those instances when a state court interprets federal law, the federal court need not defer to the state court's interpretation. *See Townsend v. Sain*, 372 U.S. 293, 318 (1963). Because the tribal court decided that federal common law permitted the tribal court to assert jurisdiction in this matter, the federal district court and the Eighth Circuit Court of Appeals properly determined that federal law did not permit such assertion of jurisdiction.

The Eighth Circuit ruling does not conflict with the Ninth Circuit's decision in *Sanders v. Robinson*. It is true that in *Sanders* the Ninth Circuit noted that a tribal court's interpretation of tribal law was binding on the court. 864 F.2d at 633. The Ninth Circuit went on to note, however, that "a federal court must still, under § 1331 decide whether a tribal court has asserted its jurisdiction beyond lawful limits." *Id.* Thus, both the Eighth Circuit and the Ninth Circuit recognize that a district court has the authority to determine whether a tribal court has exceeded its jurisdictional limits.

2. The Tribal Code Did Not Permit the Assertion of Jurisdiction.

The tribal code in effect at the time Parisien commenced his suit provided that the tribal court shall have civil jurisdiction over non-Indians if the non-Indian submits himself to the court's jurisdiction. Turtle Mountain Tribal Code § 2.0102(1) (1976). The tribal appellate court acknowledged that Twin City did not expressly consent

to tribal court jurisdiction. The district court issued its injunction in this matter because Twin City did not submit to the jurisdiction of the tribal court. (A-25). Thus, both the tribal appellate court and the district court agreed that Twin City did not expressly submit to the jurisdiction of the tribal court.

Instead, the tribal appellate court found that Twin City implicitly submitted to the jurisdiction of the tribal court. The tribal appellate court based its decision upon an analysis of federal common law. As noted above, the tribal appellate court's interpretation of *Montana* and other Supreme Court cases was in error and the Eighth Circuit properly affirmed the determination that the tribal court had no jurisdiction.

In an apparent recognition that the tribal code did not permit the assertion of jurisdiction over a defendant such as Twin City, the Turtle Mountain Band of Chippewa Indians revised the jurisdictional statute one month after the district court's decision. The petitioner contends that the amended code applies and that Twin City was subject to jurisdiction pursuant to the amended code. Although a court is to apply the law in effect at the time a court renders a decision, this rule is changed if manifest injustice results. *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). To determine whether it is unjust to apply a law in effect at the time of an appellate decision, a court must analyze "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 717.

When a change effects a substantive right, it should not be presumed to operate retroactively. *Bennett v. New*

Jersey, 470 U.S. 632, 638 (1985); *Hasse v. American Photograph Corp.*, 299 F.2d 666, 668 (10th Cir. 1962); *Rogers v. Firestone Tire and Rubber Co.*, 599 F.Supp. 676, 677 (S.D. Fla. 1984). For that reason, a tribe's attempt to amend a jurisdictional statute in an attempt to cure a jurisdictional defect cannot have retroactive operation. *R. J. Williams Co. v. Fort Belknap Housing Authority*, 509 F.Supp. 939, 938 n.2 (D. Mont. 1981).

It would be manifestly unjust to apply the 1987 jurisdictional statute retroactively to Parisien's claim against Twin City. At the time Twin City entered into the subcontract with Parisien, the tribal court could assert jurisdiction over a non-Indian only if the non-Indian submitted to the jurisdiction of the tribal court. Undoubtedly, those in business consider jurisdictional questions when entering into commercial transactions. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 (1985) (choice of law provisions in contract considered for jurisdiction). Because it would be unjust to apply the amendment retroactively, the original tribal code provision should be the only jurisdictional basis considered.

Finally, even if the amended statute is applied the Eighth Circuit's decision should not be modified. The tribe's attempt to assert jurisdiction is impermissible in light of *Montana*. Therefore, the Eighth Circuit's affirmance of the district court's decision was proper and need not be further reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied. Twin City exhausted its tribal court remedies before it sought the protection of the district court. The district court properly issued an injunction because the tribal court attempted to assert jurisdiction beyond its lawful limits. The Eighth Circuit Court of Appeals' affirmance of the district court's decision is consistent with prior Supreme Court opinions and is not in conflict with any other circuit decision.

Respectfully submitted,

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